Petition

Office - Supreme Court, U.S.
FILED
OCT 5 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-653

In the Supreme Court of the United States

OCTOBER TERM, 1981

CARL BREWER,
Petitioner

versus

UNITED STATES POSTAL SERVICE,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

PETITION FOR WRIT OF CERTIORARI

WILLIAM M. PACE
Post Office Box 112
Aberdeen, Mississippi 39730
601/369-2310

Attorney for Petitioner

Allmond Printing Co., 200 East Commerce St., Aberdeen, MS 39730, (601) 369-4848

QUESTION PRESENTED

Whether a Federal employee, who is charged with falsifying timecards, must be advised of the dates involved upon making timely discovery applications, prior to the Merit Systems Protection Board hearing?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities iii

Opinions Below 2

Grounds for Jurisdiction 2

Statutes Involved 2

Statement of the Case 3

Argument 6

Conclusion 8

Certificate of Service 9

Appendix

Appendix A - U.S. Court of Claims Opinion No. 9-79, April 22, 1981 ..... A-1

Appendix B - Merit Systems Protection Board decision ATO75209022, October 24, 1979 ..... B-1

Appendix C - Petitioner's Motion for Rehearing or Rehearing En Banc in the U.S. Court of Claims, May 21, 1981 ..... C-1

Appendix D - Court of Claim Denial of Petitioner's Motion for Rehearing, July 10, 1981 ..... D-1

TABLE OF AUTHORITIES

Cases:

Burkett v. United States, 402 F.2d 1002 (1968) 6

Money v. Anderson, 202 F.2d 34, (C.A. D.C. 1953) 6

Statutes:

5 U.S.C. 7512(b)(1) (Repealed 1978) 6

5 U.S.C. 7513(b)(1) 2

5 U.S.C. 7701 8

5 U.S.C. 7703(c) 2

28 U.S.C. 1255(1) 2

Rules:

Rule 17.1(c) Rules of the Supreme Court 2

Regulations:

U.S. Postal Service Regulation 144.3, Adjusting for Missing Clock Rings 4

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

NO.

CARL BREWER,
Petitioner

versus

UNITED STATES POSTAL SERVICE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Claims rendered on April 22, 1981; motion for rehearing denied on July 10, 1981.

OPINIONS BELOW

The U. S. Court of Claims in a decision dated April 22, 1981, denied petitioner's petition (Appendix A) and affirmed the Merit Systems Protection Board's decision of October 24, 1979 (Appendix B). Petitioner's motion for rehearing (Appendix C) was denied by the U. S. Court of Claims on July 10, 1981 (Appendix D).

GROUNDS FOR JURISDICTION

Petitioner seeks review by this Court of the U. S. Court of Claims decision pursuant to Rule 17.1(c) of the Rules of the Supreme Court and 28 U.S.C. 1255(1). The original petition in the Court of Claims was authorized by 5 U.S.C. 7703(c).

STATUTES INVOLVED

5 U.S.C. Sec. 7513 Cause and Procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to——

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

STATEMENT OF THE CASE

Petitioner Brewer, on August 23, 1978, had a 26 year unblemished record of good service with the U. S. Postal Service and required only about 28 additional months of service to earn his annuity. At 3:00 PM he received a call from the acting Postmaster that if he had not resigned effective by 5:00 PM charges would be brought against him and it might affect his deferred retirement -- which he would be eligible to receive several years later at age 62.

Petitioner frantically but unsuccessfully sought legal advice and at 5:00 PM submitted a resignation effective immediately. (Appendix C, p. C-2)

The Merit Systems Protection Board (MSPB) in decision number AT752B90198, dated April 27, 1979, found the resignation to be coerced in that it did not allow sufficient time for reasoning, and ordered petitioner's reinstatement. Rather that permanently reinstate the petitioner, respondent Postal Service filed charges on May 24, 1979, and removed Petitioner from the Postal Service. (At this time, Mr. Brewer lacked only about 19 months to earn his annuity.)

The charges against petitioner, that were later upheld by the MSPB, were that he falsified postal clerk Harpoles's timecards and that he carried a piece of undeliverable "trash" mail from the post office. Petitioner's attorney attempted to require the Postal Service to specify the time cards that were alleged to be false:

> In charge number one Mr. Brewer is charged with making false entries on the timecard of Clerk Martha Harpole. Please be more specific in this charge. Mrs. Harpole has been employed for several years and we need to know which specific dates of entries are alleged to be false.

Postal inspectors, prior to petitioner's discharge, had received a statement from him that some of the entries were "not correct." Several timecards of employees at the post office had handwritten entries (rather than "clock" entries) and the postal inspectors told petitioner that handwritten entries were illegal and were automatically "false." Based on this erroneous information, petitioner did sign a statement written by one of the inspectors that some entries were "false."

The Postal Service refused to furnish an official regulation which authorized manual timecard entries, and, by omission, denied the existence of such a regulation. The petitioner's attorney vainly sought to secure the regulation by discovery methods:

> The Manual section, 243.91 refers to the recording of time on employees' timecards "except as directed by regulation." Do you know what this exception refers to? Please send me copies of the pertinent regulations.

Later, the petitioner managed by his own private means to secure the regulation:

> 144.3 Adjusting for Missing Clock Rings

> .31 Missing clock rings are a serious matter and should be dealt with as such. If a timekeeper discovers that a clock ring is missing from an employee's timecard, the timekeeper should call it to the attention of the appropriate supervisor. The supervisor is permitted to manually enter the missing clock ring according to the supervisor's best estimate of the time that the employee actually would have recorded the clock ring had the employee been following procedures.

Thus, prior to the hearing, the Postal Service refused to specify the dates of the timecards that were alleged to be false and at the hearing it refused to produce any witnesses with knowledge that any timecards were falsified. The Postal Service was also unaware that the petitioner had located the "missing" regulation authorizing manual timecard entries.

At the MSPB hearing, petitioner testified that although some of the manual entries may be technically false by a few minutes, no timecard entry was willfully falsified in a substantial sense. He also produced the "missing" Postal Service regulation authorizing occasional manual timecard entries.

The MSPB, in a decision number AT075209022 dated October 24, 1979, affirmed the dismissal (Appendix B). The MSPB based its decision affirming the dismissal "particularly regarding the timecard of Clerk Harpole." (Appendix B, p. B-6).

ARGUMENT

Petitioner applied to the U. S. Court of Claims for a judicial review of the MSPB decision -- based primarily on the proposition that it is virtually impossible for any employee to prove that all of his, or any other employee's timecards, were all accurate. (Clerk Harpole had been employed for four or five years and the number of time entries numbered several thousand.)

Petitioner cited several cases holding that the statute and the due process clause required enough specificity to enable the employee to "make an informed reply." *Burkett v. U.S.*, 402 F.2d 1002 (1968); *Money v. Anderson*, 208 F.2d 34 (C.A. D.C. 1953).

(The Court of Claims completely misinterpreted petitioner's point that the "missing" regulation, which had been withheld from the petitioner, authorized manual entries, saying only that the petitioner was charged with making false entries -- not manual ones. The Postal Inspectors had either willfully or unwillfully, maintained to petitioner that all manual entries were *per se* false and had thereby gained a technical "confession" from the petitioner. The Service had to later maintain this fiction by refusing to acknowledge the existence of the regulation.)

The Court of Claims rejected petitioner's argument that charges had to be specific holding that the "new" Civil Service Reform Act of 1978, specifically 5 U.S.C. 7513 (b) (1), only required the agency to state "the specific reasons for the proposed action;" whereas, the prior section, (repealed 1978) 5 U.S.C. 7512 (b) (1),

required the adverse action to be stated "specifically and in detail." The Court of Claims believes that Congress intended to "reduce the degree of detail required in order for the agency to avoid reversal on procedural grounds." (Appendix A, p. A-6).

Thus, the Court of Claims interprets a vast difference between the phrases "specifically and in detail" and "specific reasons." Petitioner claims that in order for any employee to make an informed response, there can be no substantial difference between the two code sections, and that Congress did not intend to deny due process to civil servants.

It is important to remember that one of the main reasons for enactment of the Civil Service Reform Act of 1978 was to protect "whistleblowers." No "whistleblower" or non-crusading Federal employee who simply told the truth about management misconduct to a Congressional committee could hope to survive if he could be discharged for vague and non-specific reasons.

The petitioner sought precious few details -- he was charged with falsifying timecards of another employee -- all he needed to know was: which ones? *(An arbitrator, in a case involving the "other employee", Clerk Harpole, found that the Service failed to prove that any of the timecards were false. The arbitrator's decision was rendered prior to charges being filed against petitioner, and this explains why the Service refused to be specific in petitioner's charges.)*

CONCLUSION

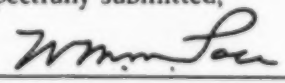
This is the first case reviewed by the Court of Claims of a Merit Systems Protection Board decision under the Civil Service Reform Act of 1978. (Appendix A, p. A-3, 10).

It is respectfully suggested that if this decision is allowed to stand, it will nullify all of the "due process" provisions incorporated in the Civil Service Reform Act of 1978.

A charge that "you have been tardy for work, but we are not going to tell you which days" cannot possibly be adequately addressed or defended against --especially for an employee who has been employed for many years. The Court of Claims found that unless the petitioner could prove that none of the timecards were falsified the charge should be sustained. The effect of this decision is to place the burden of proof on the employee, rather than on the employing agency, as required by statute. 5 U.S.C. 7701.

The Civil Service Reform Act and the integrity of the civil service is at stake in this case. The Court is respectfully urged to grant a writ of certiorari.

Respectfully submitted,



William M. Pace
Attorney for Petitioner
Post Office Box 112
Aberdeen, Mississippi 39730
(601) 369-2310

CERTIFICATE OF SERVICE

In compliance with the rules, I certify that I have this date served three copies of the above petition for writ of certiorari upon the Solicitor General of the United States, Department of Justice, Washington, D. C. 20530, and three copies upon Wyneva Johnson, Esquire, Attorney, Office of Labor Law, U.S. Postal Service, Washington, D. C. 20260 by certified-return receipt mail.

This the 29th day of September, 1981.

WILLIAM M. PACE

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

Appeal No. 9—79

(Decided April 22, 1981)

CARL BREWER, Petitioner,

v. UNITED STATES POSTAL SERVICE, Respondent

William M. Pace, attorney of record, for petitioner.

Benjamin F. Wilson, with whom was *Acting Assistant Attorney General Thomas S. Martin*, for defendant *Stephen E. Alpern, Wyneva Johnson*, of counsel.

Before FRIEDMAN, *Chief Judge*, COWEN *Senior Judge*, and KASHIWA, *Judge*.

OPINION

COWEN, *Senior Judge*, delivered the opinion of the court:

Petitioner, a former United States Postal Service employee,

was removed by the Postal Service from his position on the grounds that he falsified another employee's time cards and removed a piece of third class mail from the post office in violation of the Postal Service Manual. He requests review of the Merit Systems Protection Board's decision affirming his removal and seeks back pay, reinstatement to the service, and related benefits.[1]

We hold that the decision of the Merit Systems Protection Board is supported by substantial evidence and without procedural error. We have also concluded that the penalty of removal is not so disproportionate to the offenses charged as to constitute an abuse of discretion. Therefore, we affirm the decision of the Board.

I.

At the time of his removal, petitioner, Carl Brewer, was Superintendent of Postal Operations at the United States Post Office in Starkville, Mississippi. His responsibilities included certifying the time cards of Clerk Martha Harpole, who was the designated timekeeper for the other employees at the post office. Mr. Brewer had served over 27 years as a Government employee, 25 of those years with the Postal Service, and lacked approximately 19 months of service to be eligible for his annuity.

Petitioner received notice of the proposed adverse action dated May 24, 1979, charging him with (1) making false entries on the

[1] See Part IV regarding petitioner's claim for back pay and reinstatement.

time card of Clerk Harpole; (2) removing a piece of third class bulk rate mail from the post office; and (3) concealing a money shortage in the account of another clerk, all in violation of cited regulations in the Postal Service Manual.[2] Mr. Brewer's removal from the Postal Service, based on these three charges, became effective on July 24, 1979. He appealed and requested a hearing before the Merit Systems Protection Board. At the hearing, held on September 25, 1979, the Postal Service submitted four affidavits signed by Mr. Brewer in August 1978. These affidavits summarized Mr. Brewer's responses to questioning by Postal Service inspectors who had been investigating reported irregularities at the Starkville post office. In two affidavits, Mr. Brewer admitted having made entries on Mrs. Harpole's time cards knowing that the entries were not correct. In another, he admitted taking a piece of undeliverable third class mail home with him.

On June 8, 1979, after he had been given notice on May 24, 1979, of the proposed removal action, petitioner made and submitted an affidavit stating that the entries on the time cards were false only in a technical sense, because only a few minutes were involved and none of the entries were intended to be false.

At the hearing, Mr. Brewer testified that the affidavits he had made in August 1978 were true statements and that he would have refused to sign them if they were not correct. However, he also testified that the false entries were unintentionally incorrect by only a few minutes, and that he never willfully made false entries. Two

---

[2] The Merit Systems Protection Board determined that the third charge was not sustained by the necessary preponderance of the evidence. That charge is not at issue here.

postal inspectors involved in the investigation of the Starkville Post Office testified at the hearing, and the Board had available an investigative memorandum written by one of the inspectors, who described his observation of events at the post office and the subsequent investigation of Mr. Brewer.

In its initial opinion, dated October 24, 1979, the Merit Systems Protection Board determined that charges (1) and (2) were sustained by a preponderance of the evidence and affirmed the removal action. The Board's decision became final on November 28, 1979, and petitioner timely filed his petition for review in this court. 5 U.S.C. § 7703(b)(1).

II.

This case is the first review by this court of a decision of the Merit Systems Protection Board under the Civil Service Reform Act of 1978. Pub. L. No. 95—454, 92 Stat. 1111 (1978) (codified in scattered sections of 5, 10, 15, 28, 31, 38, 39 and 42 U.S.C.). That Act directs the Court of Claims to:

> • • • review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—
> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (2) obtained without procedures required by law, rule, or regulation having been followed; or
> (3) unsupported by substantial evidence; • • •
> [5 U.S.C. § 7703(c).]

A.

Petitioner contends that the decision of the Board sustaining charge (1) was not supported by substantial evidence. He asserts that the "Postal Service tendered no direct evidence that any time card entry for Clerk Harpole was willfully false and refused to specify to the [petitioner] or at the hearing that any particular entry was false." After a review of the evidence offered at the hearing by both parties, we reject this argument.

Under the statutory standard of review, the court will not overturn an agency decision if it is supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

In determining whether the Board's decision is supported by substantial evidence, the standard is not what the court would believe on a *de novo* appraisal, but whether the administrative determination is supported by substantial evidence on the record as a whole. *Pascal v. United States*, 211 Ct. Cl. 183, 188, 543 F.2d 1284, 1287 (1976).

Here, the Board based its decision on charge (1) on affidavits made by petitioner on August 9, and August 10, 1978, after he had been given a written (*Miranda*) warning and had signed a waiver of his rights. The Board also relied upon the Postal Inspector's corroborating investigative memorandum. Under these circumstances, the Board, as a trier of the facts, had the right to

judge the credibility of the witnesses and to reject Mr. Brewer's explanation that the entries were only technically false and not intentionally made. Since his explanation was made long after his affidavits of August 1978, and after the removal action had been taken by the Postal Service, the Board could reasonably conclude that charge (1) should be sustained.[3] *Alers v. United States*, 224 Ct. Cl.—, 633 F.2d 559 (1980).

B.

Petitioner further contends that several procedural errors require this court to set aside the decision of the Board. Specifically, petitioner argues that:

1. The Postal Service failed to inform him which specific time card entries were false.

2. The Postal Service failed to furnish all written statements and reports made by the inspectors regarding Mr. Brewer.

3. The Postal Service failed to produce at the hearing the Postal Service employees upon whom the inspectors relied for information.

4. The Postal Service failed to provide certain regulations pertaining to manual entries on time cards.

5. Postal Inspector George L. Hughes' testimony as to the basis for the investigation was hearsay.

---

[3] Although petitioner does not specifically argue that the second charge should be set aside for lack of substantial evidence, the affidavit in which petitioner admitted removing the piece of mail from the post office supports the decision of the Board on that charge.

We find these contentions to be without merit.

Prior to the effective date of the Civil Service Reform Act, agencies were required by statute to state "any and all reasons" for a proposed adverse action "specifically and in detail." 5 U.S.C. § 7512(b)(1) (1976) (repealed 1978). The 1978 Act changed that requirement to "30 days' advance written notice * * * stating the specific reasons for the proposed action." 5 U.S.C. § 7513(b)(1) (Supp. III 1979). Congress thus intended to reduce the degree of detail required in order for the agency to avoid reversal on procedural grounds. S. REP. NO. 969, 95th Cong., 2d Sess. 50, *reprinted in* [1978] U. S. CODE CONG. & AD. NEWS 2723, 2772. The agency, however, is still required to state "the reasons for the proposed action in sufficient detail to allow the employee to make an informed reply." *Id.*

In the notice of the proposed adverse action, Mr. Brewer was charged with making false entries on Clerk Harpole's time cards in violation of specifically cited sections of the Postal Service manual. The basis for this charge was his admission in the two affidavits of August 1978. No greater specificity was required to apprise petitioner of the nature of the charges against him. *Connelly v. Nitze*, 401 F.2d 416, 424 (D.C. Cir. 1968). Contrary to petitioner's contentions, he was not required to assume the burden of proving that all of Clerk Harpole's time cards were accurate. The Board recognized and followed the statutory requirement that the employing agency has the burden of proof in cases involving employee misconduct, 5 U.S.C. § 7701; see S. REP. NO. 969, 95th Cong., 2d Sess. 55, *reprinted in* [1978] U.S. CODE CONG. & AD.

NEWS, 2723, 2777; H. CONF. REP. NO. 1717, 95th Cong., 2d Sess. 138, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 2860, 2872. The Board determined that the Postal Service had met that burden, and as noted above, the court finds substantial evidence to support that conclusion.

In enacting the Civil Service Reform Act of 1978, Congress declared that this court should reverse agency actions for procedural error "only if the procedures followed substantially impaired the rights of the employees." S. REP. NO. 969, 95th Cong., 2d Sess. 64, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 2723, 2786. Accordingly, the failure of the Postal Service to provide "all written statements, or reports of any kind" made by the Postal Service inspectors regarding Mr. Brewer does not warrant a reversal of the Board's decision. The Postal Service provided petitioner a copy of the investigative memorandum later introduced at the hearing.

The answer to petitioner's allegation that the Postal Service failed to call certain Postal Service employees as witness, is that petitioner himself failed to request the presence of these witnesses. Also, the hearing examiner stated at the hearing that he would give no consideration whatsoever to any complaint other employees may have had about Mr. Brewer or Clerk Harpole. The statements of these employees were not considered by the Board in making its determination. Consequently, on this point, we find there was no procedural error which substantially impaired petitioner's right.

Petitioner's contention regarding the failure of the Postal Service to provide certain regulations is likewise without merit. The

charges against petitioner, as well as the basis for those charges, were clearly stated in the notice of proposed adverse action, and the agency provided copies of the regulations referred to in that notice. Petitioner argues the Postal Service failed to provide regulations showing that it was proper for him to make manual entries on another employee's time card. However, petitioner was charged with *falsifying* another employee's time cards, not simply with making manual entries. Thus, the regulations petitioner sought were irrelevant to the charges he faced.

Petitioner's objection to the inspector's hearsay testimony is also of no avail. Hearsay is admissible in an administrative hearing and may even constitute substantial evidence to support an administrative determination. *Richardson v. Peralez*, 402 U.S. 389, 402 (1971); *Fairfield Scientific Corp. v. United States*, 222 Ct. Cl.—, —, 611 F.2d 854, 859, (1979); *Reil v. United States*, 197 Ct. Cl. 542, 547, —48, 456 F.2d 777, 780 (1972). Even so, the hearing officer here based his decision on other evidence we have determined to be substantial and did not need to rely on hearsay testimony.

C.

Finally, the petitioner contends that the penalty of removal is so "outrageously disproportionate" to the offenses charged that it constitutes an abuse of discretion and should not be allowed to stand. This contention is one which we examine with particular care in the light of our previous decisions involving the same question, because petitioner had 27 years of Government service and would have been eligible for a Civil Service annuity had he

remained in service for another 19 months.

We have said that we will defer to the judgment of the agency as to the appropriate penalty for employee misconduct, unless its severity appears totally unwarranted in the light of such factors as the range of permissible punishment specified by statute or regulation, the disciplined party's job level and nature, his record of past performance, the connection between his job and the improper conduct charges, and the strength of the proof that the conduct occurred. *Giles v. United States*, 213 Ct. Cl. 602, 608, 553 F2.d 647, 650-51 (1977)

As Superintendent of Postal Operations, Mr. Brewer occupied a responsible managerial position with the Postal Service. He had a position requiring a high degree of honesty and integrity. The Postal Service had a right to expect that he would set an example for other employees by obeying the regulations set forth in the Postal Manual. The Postal Service also had a right to expect from him a higher standard of conduct than from a lower level employee and to take into account the reaction of other employees regarding any misconduct by him. *Hoover v. United States*, 206 Ct. Cl. 640, 648—49, 513 F.2d 603, 607—08 (1975); *Joseph A. Yacovone v. William F. Bolger, Postmaster General of the United States, et al.*, No. 79—2043 (D.C. Cir., decided February 20, 1981).

The second charge against petitioner involving the removal of undeliverable mail was obviously a minor offense which, standing alone, would not justify the action taken by the agency in this case. However, when both charges are considered together in the context

of petitioner's supervisory position, we have concluded that we should reject petitioner's argument that the penalty constituted an abuse of discretion. Comparable severe sanctions have been upheld by this court before. *Jones v. United States,* 223 Ct. Cl. —, 617 F.2d 233 (1980), *Heffron v. United States,* 186 Ct. Cl. 474, 405 F.2d 1307 (1969). Given the facts which have been presented in this case, we do not find that the penalty of removal was so inherently disproportionate to the offense charged that it amounted to an abuse of discretion.

III.

For the reasons stated above, petitioner's request for review is denied and the decision of the Board is affirmed.

IV.

Since this is the first review by this court of a decision of the Merit Systems Protection Board under the Civil Service Reform Act of 1978, we call attention to the fact that the petitioner seeks relief which is not within our power to grant under the Act. He sues for back pay, requests reinstatement, and claims the right to related benefits. The standard of review set forth in the Act is limited. We are authorized only to "hold unlawful and set aside" an improper agency action. 5 U.S.C. § 7703(c). Therefore, we are without jurisdiction to render a money judgment —a Tucker Act remedy which the court is empowered to grant in other cases.[4] If judgment

[4] See remarks of John I. Heise, *Proceedings of the 1979 Court of Claims Judicial Conference,* pp. 118-19 (Mathew Bender & Co. 1979).

had been rendered for petitioner, we would have been required to remand the case to the Merit Systems Protection Board with instructions to determine the amount of back pay and related benefits due and to reinstate him.[5]

---

[5] In response to a question at oral argument, respondent's counsel expressed the view that when the court decides that the agency action should be set aside as unlawful, it has the power to remand with instructions to award the discharged employee back pay and to reinstate him to his former position. For the procedure to be followed in appeals from decisions of the Merit Systems Protection Board, see Court of Claims Rules 171-184; 14(b)(2) as amended; 54(a) as amended; 144(a)(7) as amended; 224; 214(d)(2) as amended, and Appendix F. These rules were promulgated by General Order No. 2 of 1979, issued June 27, 1979.

• U. S. Government Printing Office: 311-087/23

APPENDIX B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA FIELD OFFICE

CARL BREWER v U. S. POSTAL SERVICE
Initial Decision Number AT075209022

OCTOBER 24, 1979

INTRODUCTION

By letter dated July 25, 1979, a petition of appeal was submitted to this office on behalf of Mr. Carl Brewer, the appellant. The appeal is from the July 17, 1979 decision to remove the appellant from the position of Superintendent of Postal Operations with the U.S. Postal Service, Starkville, Mississippi. The removal action was effected on July 24, 1979, and was based on three charges.

A hearing requested by the appellant was held on September 25, 1979, at Columbus, Mississippi, and a verbatim transcript of the hearing has been made a part of the appellate record.

JURISDICTION

The appeal is governed by the provisions of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978) as codified in Title 5, United States Code (1978) (5 U.S.C.). The

appellant is entitled to appeal the removal action in accordance with 5 U.S.C. §7513(d) and § 7701(a) on the bases that he was an employee as defined in 5 U.S.C. § 7511(a)(1)(B) and the action is one which is covered by 5 U.S.C. § 7512. Accordingly, the appeal has been accepted for adjudication.

ANALYSIS AND FINDINGS

The appellant is first charged, in the May 24, 1979 notice of proposed adverse action, with making false entries on the time card of Clerk Martha E. Harpole, entries that were in violation of the Postal Service manual.

In support of the charge, the agency furnished, at the hearing, as part of agency Exhibit 1, an August 9, 1978 affidavit by the appellant, witnessed by two Postal Inspectors, in which the appellant acknowledged, in response to questions by Postal Inspectors, that he had, on several occasions, made entries on Clerk Harpole's time card, knowing that the entries were incorrect; that he would write in her scheduled reporting time when he knew Clerk Harpole was tardy; that approximately 30 minutes is the most time he remembered giving her; and that he believed it had been over a year since he had made such an incorrect entry. The agency also furnished a copy of an August 10, 1978 affidavit by the appellant, in which he acknowledged that he made entries on Clerk Harpole's time card at various times from 1975 until sometime in 1978; that even though he had made numerous entries on Clerk Harpole's time card, only a small portion of the entries were false; and that he had no way of knowing which of his entries were false.

In an affidavit responding to the notice of proposed adverse action, the appellant advised that some of the entries on Clerk Harpole's time card were false, in the technical sense, because only a few minutes were involved and that none of the entries were intended to be false.

The evidence (page 6, appellant's Exhibit 1) reflects that six other Postal employees generally testified, in connection with a grievance filed by Clerk Harpole, that entries on Clerk Harpole's time card had been falsified.

The appellant testified (T.75) that it was his responsibility to make entries on Clerk Harpole's card if she failed to clock in or out. The appellant asserts that the agency has failed to support the charge of false entries on Clerk Harpole's time card because the agency did not specifically identify which entries were false. However, the evidence (agency Exhibit 1) shows that the appellant, after being advised of his constitutional rights (Miranda warnings) including the right to remain silent and the right to an attorney, furnished two affidavits in which he admitted making false entries on Clerk Harpole's time card. Furthermore the appellant admitted, in his affidavit responding to the charge, that he made false entries. In light of the appellant's sworn admissions, and the corroborating evidence that false entries were made on Clerk Harpole's time card, I find that the charge is sustained by the necessary preponderance of the evidence.

The appellant is next charged with removing a single piece of third-class bulk rate mail from the Post Office, in violation of the

Postal Service manual. The mail matter removed by the appellant is identified as a publication by the Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, which was jointly addressed to three individuals with a Starkville, Mississippi, address.

In support of the charge, the agency furnished a copy of an August 5, 1978 affidavit by the appellant, asserting that the publication was undeliverable as addressed; was, therefore, a disposable item; and that he took it home with him. Postal Inspector G. L. Hughes testified (T.11-14) that the appellant was observed, by Postal Inspectors, leaving the Post Office with the publication; that when initially confronted about the matter, the appellant denied taking the publication; but that when the appellant was advised that three Postal Inspectors had observed him leave the Post Office with the publication, the appellant then acknowledged taking it.

In his written response to the charge, the appellant tacitly acknowledged that he took the publication but contended that the publication constituted waste material because it could not be returned or delivered, and that he did not make a practice of carrying waste material from the Post Office.

At the hearing, the appellant asserted (T.74), for the first time, that he believed that he had retrieved the publication from a trash can, but that it was possible that another employee had given the publication to him (T.86). The appellant also essentially testified that he had never been advised that it was impermissible to take

undeliverable mail.

The appellant has not shown that he was authorized to take the publication, and in light of the undisputed fact that he did so, I find the charge sustained by preponderate evidence.

The third charge set out in the notice of proposed removal essentially alleges that, contrary to agency regulations, the appellant, after checking the accountability (stamps, money, etc.) of Clerk J. H. Tibbett, concealed a shortage of between $100 and $150 in the clerk's accountability. In support of the charge, the agency cited an August 9, 1979 affidavit furnished by the appellant to Postal Inspectors, alleging that the appellant admitted concealing the shortage.

In his sworn written response to the agency, the appellant denied that he conducted an audit of Clerk Tibbett's accountability and that the discrepancy in the account was discovered by the Postmaster (who is no longer employed by the agency). At the hearing, the appellant testified that the Postmaster had audited the account of Clerk Tibbett and that he learned of the shortage from the Postmaster (T.80-81); and that the Postmaster was responsible for making any adjustments (T. 92). The appellant expressed the opinion that every employee in the Post Office knew of the shortage and that he (the appellant) did not conceal it (T.82).

The August 9, 1979 affidavit furnished by the appellant to Postal Inspectors reads, in pertinent part, as follows:

> There was a time in the past year when Clerk Jimmy Tibbet's credit was short between $100 and $150. This shortage was never reported to the Inspection Service, the SCF, or on the office forms, and no record was made on form 3368. Clerk Jerry Conner suggested that the shortage be made up by all employees and Clerks Conner, Harpole, Collins, McKee, and Tibbett all put in between $20 and $30. I also put in the same amount of money. I don't know why I did not report this or enter it on the forms. I just thought it would be better for him and us too.

Thus, the appellant, in his affidavit, did acknowledge his awareness of the shortage, however, he did not report that he had checked Clerk Tibbett's accountability. In light of the absence of any evidence that it was the appellant who discovered the shortage in Clerk Tibbetts' acountability, and the undisputed testimony by the appellant that the shortage was revealed as a result of an audit by the Postmaster, who presumably would have had the responsibility to report any shortage, as required by agency regulations, I conclude that the evidence is insufficient to support the charge concerning this matter. Accordingly, I find that the charge is not sustained.

In summary, charges 1 and 2 are sustained by the necessary preponderance of the evidence and charge 3 is not sustained.

The appellant occupied a responsible managerial position with the agency, a position of trust which clearly required honesty and integrity. Notwithstanding the appellant's many years of employment with the agency, I conclude that the appellant's conduct, particularly regarding the time card of Clerk Harpole, so

violated the trust placed in the appellant by the agency, that the removal action, based on the sustained charges, was for such cause as will promote the efficiency of the service.

DECISION

The removal action is affirmed.

NOTICE

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on November 28, 1979 unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to the proceeding, the Director of the Office of Personnel Management, and the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The petition for review must set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific reference to the record.

The petition for review must be received by the Secretary of the Merit Systems Protection Board, Washington, D. C. 20419, no later than the date set forth above.

After providing an opportunity for response by other parties, the Board may grant a petition for review when it is established that:

(a) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(b) The decision of the presiding official is based upon an erroneous interpretation of statute or regulation.

Under 5 U.S.C. § 7703(b)(1) the appellant may petition the United States Court of Appeals for the appropriate circuit or the United States Court of Claims to review any *final* decision of the Board provided the petition is filled no more than thirty (30) calendar days after receipt.

For the Board:

S. F. VESSER, JR.
Presiding Official

APPENDIX C

IN THE
UNITED STATES COURT OF CLAIMS

CARL BREWER, Plaintiff

v.

UNITED STATES POSTAL SERVICE, Respondent

No. Appeal 9-79

PETITIONER'S MOTION FOR REHEARING
OR REHEARING EN BANC

Petitioner respectfully moves the panel to rehear and reconsider its decision or to present the issue to the Court en banc.

ARGUMENT

The Court's decision, and the petitioner's arguments, indicate that the "central issue" in this case involves the amount of detail the Postal Service must inform an employee in a charge in order for the employee to "make an informed reply." Or, to address the facts in this case: Is the Postal Service required to notify the employee the dates of alleged time card falsifications when he is charged with falsifying time cards?

At the time of the investigation, the petitioner gave the postal inspectors an affidavit that he had falsified Clerk Harpole's time

card. This admission was based on the erroneous information given him by the inspectors that all hand written entries on time cards were automatically false. The Postal Service continued this fiction by withholding from the petitioner a Postal Service regulation specifically authorizing hand written entries. (This fact was pointed out to the Court to explain the terminology used in Mr. Brewer's affidavit. The petitioner did not mean to imply that the regulation was relevant to the charge.)

After the petitioner discovered the regulation through his own means, he made an explanatory affidavit that the entries were technically false and not intentionally made. During oral argument and in the Court's written opinion, it is apparent that the timing of petitioner's explanation was important to the Court (i.e. "He made the explanation after he had talked to a lawyer"). There is a "missing year" in this case but the delay was not caused by the petitioner, and was not explained in the briefs because it was not considered relevant.

The affidavits were given the inspectors in August 1978. The explanation affidavit was presented on June 8, 1979. What happened during the time span in between? On August 23, 1978, Mr. Brewer received a telephone call at 3:00 pm from the acting postmaster that if he did not resign by 5:00 pm, charges would be brought against him and it would affect his retirement. Mr. Brewer frantically attempted to see an attorney and failing that, barely got to the post office before 5:00 pm and submitted a one sentence hand written resignation. The M.S.P.B. by decision No. AT752B90198, dated April 27, 1979, found the resignation to be coerced and ordered his reinstatement.

Rather than restore Mr. Brewer to duty, the Postal Service placed him on administration leave and on May 24, 1979, served him with the charges involved in this case. Mr. Brewer was able to locate the regulation authorizing handwritten time entries and in response to that filed his explanation affidavit on June 8, 1979. Thus, Mr. Brewer did answer the charges very soon after they were filed. If the Court believes the timing of petitioner's explanation is important then it is, of course, important and relevant.

(It is also important to remember that during this "missing year" the Postal Service attempted but failed to prove that any specific time cards were falsified in its case against Clerk Harpole. That is why the Service deliberately chose to be non-specific in its charge against Mr. Brewer -- a "specific" charge would fail and had already done so, but a "general" charge might succeed because Mr. Brewer could not make an informed reply. The Service reasoned that if they did not specify particular time cards they would not be required to present any proof. The tactic proved successful.)

The Service did not present any witness at the hearing, or any statement or affidavit from anyone else, that any time card was falsified. The investigative file did not contain one word or item that any particular time card was false. The only witness present at the hearing, or named in the investigative memorandum who had direct information of the time cards, was Mr. Brewer -- who testified that no time card was willfully falsified. (In fact, the inspector *did not name any employee* in his testimony or in the investigative report who had reported that the time cards were falsified. His testimony consisted of "they said" or "some employees told me".)

CONCLUSION

The petitioner respectfully moves the panel to reconsider its decision in this case or to present the issue to the Court en banc. The petitioner has never contended that he was not informed of what he was charged with -- he was charged with falsifying the time cards of Clerk Harpole who had been employed for eight years; but rather, the petitioner contends that it is absolutely impossible for any employee to sensibly respond to a charge that general.

The panel's decision in this case is unusually important in its practical application. Agencies would refuse to make any specific charges in light of this decision, because they could always, if pressured too close by the Board, fill in the gaps at the hearing, too late for the employee to respond. (Petitioner Brewer attempted by discovery to require specifics prior to the hearing, but the request was denied by the agency.)

Petitioner suggests that the case should be reversed and remanded to the Board or remanded with instructions to require the agency to answer the discovery requests of the petitioner for a de novo hearing.

Respectfully submitted,

WILLIAM M. PACE
Attorney for Petitioner
P.O. Box 112
Aberdeen, Mississippi 39730
601/369-2310

APPENDIX D

IN THE UNITED STATES COURT OF CLAIMS

July 10, 1981

ORDER

PER CURIAM: IT IS ORDERED that the motions of the parties, as set forth, for rehearing, reconsideration or other relief under Rules 7(d), 151(b) and 152 are DENIED:

App. 9-9 CARL BREWER

Petitioner's motion, filed May 20, 1981, for rehearing or rehearing *en banc* in re opinion of April 22, 1981.
(FRIEDMAN, *Chief Judge*, COWEN, *Senior Judge*, and KASHIWA, *Judge*, as to rehearing)
(The SEVEN ACTIVE JUDGES as to rehearing *en banc)*

Opposition

No. 81-653

Office - Supreme Court, U.S.
FILED
DEC 3 1 1981
ALEXANDER L. STEVAS,

In the Supreme Court of the United States

OCTOBER TERM, 1981

CARL BREWER, PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

WILLIAM KANTER
BENJAMIN F. WILSON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

STEPHEN E. ALPERN
Associate General Counsel

WYNEVA JOHNSON
Attorney

United States Postal Service
Washington, D.C. 20260

QUESTION PRESENTED

Whether petitioner, who was discharged from his employment with the Postal Service for making false entries on the time cards of another federal employee, had to be advised by the Postal Service of the specific dates the false entries were made, even though petitioner admitted having made them.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 8

TABLE OF AUTHORITIES

Cases:

Baughman v. *Green*, 229 F. 2d 33 6

Codd v. *Velger*, 429 U.S. 624 7

Connelly v. *Nitze*, 401 F. 2d 416 6

Greenway v. *United States*, 175 Ct. Cl. 350, cert. denied, 385 U.S. 881 6

Grover v. *United States*, 200 Ct. Cl. 337 4

Constitution and statutes:

United States Constitution, Fifth Amendment (Due Process Clause) 3, 4

Civil Service Reform Act of 1978, 5 U.S.C. (Supp. IV) 1101 *et seq*:

5 U.S.C. (Supp. IV) 7513 3

5 U.S.C. (Supp. IV) 7513(b)(1) 5

5 U.S.C. 7512(b)(1) 5

Miscellaneous:

S. Rep. No. 95-969, 95th Cong., 2d Sess. (1978) 6

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-653

CARL BREWER, PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. A-1 to A-11) is reported at 647 F. 2d 1093.

JURISDICTION

The judgment of the Court of Claims was entered on April 22, 1981, and a petition for rehearing was denied on July 10, 1981 (Pet. App. D). The petition for a writ of certiorari was filed on October 5, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

STATEMENT

1. Petitioner was employed as Superintendent of Postal Operations at the United States Post Office in Starkville, Mississippi. On May 24, 1979, he received advanced written notice of removal from that position (App. 1-2).[1] The notice

---

[1] "App." refers to documents set out in a separate appendix that we are lodging with the Clerk of this Court and serving on petitioner. These documents were included as part of the administrative record reviewed by the Court of Claims.

recited the specific conduct that served as the basis for his proposed removal (App. 1):[2]

> You are charged with making false entries on the timecard of Clerk Martha E. Harpole. In * * * affidavit[s] furnished Postal Inspectors P.A. Quarles and B.R. Upson, dated August 9, 1978, and Postal Inspectors G.L. Hughes and P.A. Quarles dated August 10, 1978, you admitted making false entries on Clerk Harpole's timecard. This action is in violation of Handbook F-21, Sec. 133, and 243.9, Postal Service Manual.

The United States Postal Service decided to remove petitioner, and he appealed to the Merit Systems Protection Board ("MSPB"). Following a hearing, the MSPB issued its initial decision sustaining petitioner's removal (App. 3-7). With regard to the charge of falsifying entries on another employee's time card, the MSPB found that (App. 4):

> the evidence (agency Exhibit 1) shows that the [petitioner], after being advised of his constitutional rights (Miranda warnings) including the right to remain silent and the right to an attorney, furnished two affidavits in which he admitted making false entries on Clerk Harpole's time card. Furthermore the [petitioner] admitted, in his affidavit responding to the charge, that he made false entries. In light of the [petitioner's] sworn admissions, and the corroborating evidence that false entries were made on Clerk Harpole's time card, I find that the charge is sustained by the necessary preponderance of the evidence.

---

[2]The removal also was predicated on a charge that petitioner had, without authorization, taken a piece of undeliverable third class bulk rate mail from the Starkville Post Office (App. 1-2). The notice of proposed removal contained a third charge that was not sustained and is not raised in this Court (App. 1-2, 5-6).

The MSPB concluded that (App. 6):

> The [petitioner] occupied a responsible managerial position with the agency, a position of trust which clearly required honesty and integrity. Notwithstanding the [petitioner's] many years of employment with the agency, I conclude that the [petitioner's] conduct, particularly regarding the time card of Clerk Harpole, so violated the trust placed in the [petitioner] by the agency, that the removal action, based on the sustained charges, was for such cause as will promote the efficiency of the service.

Petitioner sought review in the Court of Claims, requesting retroactive reinstatement to his position, back pay and related benefit entitlements. Petitioner argued that the decision of the Postal Service to remove him was not supported by substantial evidence, that the penalty of removal was "outrageously disproportionate" to the offenses charged and that he was not provided a "written statement of charges in sufficient detail to allow him to defend himself," in violation of the Due Process Clause of the Fifth Amendment and the Civil Service Reform Act of 1978, 5 U.S.C. (Supp. IV) 7513. The Court of Claims upheld petitioner's removal on the charges of falsifying another employee's time card and of taking, for his personal use, a piece of undeliverable third class mail (Pet. App. A-1 to A-11).[3] The court held that petitioner's termination was supported by substantial evidence, that it did not constitute an abuse of discretion, and that the petitioner was provided a written statement of the charges " 'in sufficient detail to allow him to defend himself (Pet. App. A-6).' "

---

[3]While the Court of Claims was of the view that the charge of taking a piece of third class mail, "standing alone, would not justify the action taken by the agency in this case," the court concluded that when "considered together in the context of petitioner's supervisory position," the penalty of removal did not constitute an abuse of discretion (Pet. App. A-9 to A-10).

ARGUMENT

The issues raised by the petition involve the application of settled law to the particular facts of this case and pose no question warranting this Court's review.

1. Petitioner contends that since he was not informed of the specific dates (or the specific time card of Clerk Harpole) on which he was alleged to have made false entries, he was unable to "make an informed reply," in contravention of the Due Process Clause of the Fifth Amendment and the Civil Service Reform Act of 1978 (Pet. 6-7).[4] The Court of Claims specifically rejected this contention:

> In the notice of the proposed adverse action, [petitioner] was charged with making false entries on Clerk Harpole's time cards in violation of specifically cited sections of the Postal Service manual. The basis for this charge was his admission in the two affidavits of August 1978. No greater specificity was required to apprise petitioner of the nature of the charges against him. *Connelly* v. *Nitze*, 401 F. 2d 416, 424 (D.C. Cir. 1968).

Pet. App. A-6.[5] Thus, it was not necessary for petitioner to be informed of the specific dates of the time card entries in question in order to defend himself.

---

[4]Petitioner failed to argue before the MSPB that he was not informed of the specific dates of the false time card entries at issue. Consequently, this argument should be considered abandoned. See *Grover* v. *United States*, 200 Ct. Cl. 337, 345-347 (1973).

[5]See App. 8-16 (copies of two affidavits, in which petitioner admitted making false entries on the time cards of Clerk Harpole, and a third affidavit relating to this charge).

At the MSPB hearing, a postal inspector testified that during the Postal Service investigation, petitioner was shown Clerk Harpole's time

The legislative history of the Civil Service Reform Act of 1978 reveals that the requirement that an employee receive advance written notice "stating the specific reasons for the proposed action," in accordance with 5 U.S.C. (Supp. IV) 7513(b)(1), was a departure from the more stringent requirement of the prior statute, which provided that the notice of proposed action state "any and all reasons, specifically and in detail" (5 U.S.C. 7512(b)(1). The Senate Report states:

---

cards and asked to identify various handwritten entries on them. Petitioner then signed an affidavit, dated August 9, 1978, in which he stated (App. 9):

> I have on several occasions in the past I have [*sic*] written times in on Mrs. Harpole's timecard knowing that they were not correct. I would sometimes write in her scheduled reporting time when I knew she was late. About 30 minutes is the most time I can remember giving her. Most of the time the write in entries I made on her cards for ending times was the correct time she left.
>
> Mrs. Harpole was aware I was doing this. I was not aware that Mrs. Harpole was allegedly pretending to hit the time clock and then putting her card in the card rack till the Inspectors asked me about this.
>
> • • • • •
>
> She is a very good employee and I was writing in the times on the timecards as a bonus or favor.
>
> • • • • •
>
> I have been guilty of bad judgment and lax in my duties. I am sorry that all this happened. It is a mess, not only for me, but for everybody else.

On August 10, 1978, petitioner signed another affidavit in which he stated (App. 13):

> On August 9, 1978, I gave postal inspectors a sworn statement admitting that some of the handwritten entries which I placed on Clerk Harpole's time card were false, that some of my entries did not reflect the actual times that she arrived and departed from the post office.

At the MSPB hearing, petitioner further corroborated the statements made in his affidavits by testifying that he did not disagree with anything in his sworn statements (Pet. App. A-2). The fact that petitioner

> The change is intended to reduce the degree of detail now sometimes required in order to avoid reversal on procedural grounds. The agency must still tell the employee the reasons for the proposed action in sufficient detail to allow the employee to make an informed reply.

S. Rep. No. 95-969, 95th Cong., 2d Sess. 50 (1978).[6]

On the record of this case, it is apparent that petitioner received sufficiently detailed notice of his proposed removal to "make an informed reply." It is settled that "[i]f one is well aware of what he is being charged with, complaints as to ambiguity or lack of specificity will be rejected." *Greenway* v. *United States*, 175 Ct. Cl. 350, 358-359, cert. denied, 385 U.S. 881 (1966). See also *Baughman* v. *Green*, 229 F. 2d 33, 34 (D.C. Cir. 1956). Here, petitioner undoubtedly understood the charges. Petitioner was shown the time cards and, in his affidavits of August 9 and 10, 1978, admitted that he made the false entries (App. 8-13; see note 5, *supra*). In an affidavit submitted in response to his proposed removal (App. 14-16), after consultation with counsel, petitioner went to great lengths to rebut the entry falsification charge by stating that he had not meant to make false entries and that the time cards were only "technically false" (App. 14; see page 7, note 7, *infra*). These affidavits reflected that the notice more than "adequately apprised [petitioner] of what he [was to] defend against—and that is the central standard by which notice is to be measured." *Connelly* v. *Nitze*, 401 F. 2d 416, 424 n.10 (D.C. Cir. 1968).

---

made false entries is further borne out by a third affidavit petitioner submitted in response to the notice of proposed removal (App. 14-16), the Investigative Report of Postal Inspector Hughes (App. 20, para. 27), and the testimony at the hearing by Inspector Hughes.

[6]That Congress intended "to reduce the degree of detail required in order for the agency to avoid reversal on procedural grounds" is an observation shared by the Court of Claims (Pet. App. A-6). Moreover,

Similarly specious is petitioner's contention that the notice of proposed removal violated the Due Process Clause of the Fifth Amendment (Pet. 7). Petitioner was not removed for "vague and non-specific reasons" (*ibid.*). He was aware from the outset of the primary reason for his removal—the false entries he admitted in his affidavits. Cf. *Codd* v. *Velger*, 429 U.S. 624, 628 (1977).

2. Petitioner argues that when the postal inspectors obtained affidavits from him they "willfully or unwillfully, maintained * * * that all manual entries [on the time cards] were *per se* false," and that but for this representation, petitioner would not have "technically confessed" (Pet. 6). But petitioner did not confess simply to making manual entries; he admitted making entries that were false in fact. See Pet. App. A-8. Petitioner's affidavits establish unequivocally that he made entries on Clerk Harpole's time cards, giving her as much as 30 undeserved minutes. See page 4, note 5, *supra*.[7]

3. Petitioner contends that the Court of Claims held that "unless the petitioner could prove that none of the time-cards were falsified the charge should be sustained" (Pet. 8).

---

the written notice in question satisfied even the old standard of stating "any and all reasons [for the proposed action], specifically and in detail."

[7]The contention that the inspectors "coerced" a "technical confession" is raised for the first time in this Court (Pet. 6). This argument is, at most, a variation on an argument petitioner advanced in the Court of Claims—that the entries he made on the time cards were merely "technically false." Specifically, petitioner argued in the court below that some entries were false "in a technical sense only because only a few minutes were involved" (App. 14). However, other affidavits signed by petitioner, the Investigative Report of Inspector Hughes (App. 17-21), and the testimony of Inspector Hughes and petitioner at the hearing make clear that petitioner gave Clerk Harpole as much as 30 minutes to two hours of undeserved work credit, thus enabling her to present to the government a false claim for pay.

This, petitioner suggests, improperly shifted the burden of proof from the Postal Service to him. However, the Court of Claims correctly held that the MSPB followed the statutory requirement that the Postal Service bear the burden of proof on the entry falsification issue:

> Contrary to petitioner's contentions, he was not required to assume the burden of proving that all of Clerk Harpole's time cards were accurate. The Board recognized and followed the statutory requirement that the employing agency has the burden of proof in cases involving employee misconduct. The Board determined that the Postal Service had met the burden and as noted above, the court finds substantial evidence to support that conclusion.

Pet. App. A-6 to A-7 (citations omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

WILLIAM KANTER
BENJAMIN F. WILSON
Attorneys

STEPHEN E. ALPERN
Associate General Counsel

WYNEVA JOHNSON
Attorney
United States Postal Service

DECEMBER 1981

DOJ-1981-12

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
JAN 8 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-653

In the Supreme Court of the United States

OCTOBER TERM, 1981

CARL BREWER,
Petitioner

versus

UNITED STATES POSTAL SERVICE,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR PETITIONER

WILLIAM M. PACE
Post Office Box 112
Aberdeen, Mississippi 39730
601/369-2310

Attorney for Petitioner

Allmond Printing Co., 200 East Commerce St., Aberdeen, MS 39730, (601) 369-4848

TABLE OF CONTENTS

Page

Reply Brief For Petitioner 1

Argument 1

Conclusion 4

Certificate of Service 6

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

NO. 81-653

CARL BREWER,
Petitioner

versus

UNITED STATES POSTAL SERVICE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR PETITIONER

ARGUMENT

The respondent in its brief implies that the petitioner was apprised of the specific dates of the allegedly false time cards by being shown the cards during the investigation, and that Postal Inspector Hughes in his Investigative Report and testimony had addressed specific facts. (Res. Br. p. 6). Neither of these alleged events occurred in that context.

The petitioner had examined several time cards handed to him by the inspectors and had acknowledged that he had made many of the hand written entries. (Res. App. p. 21). At this time, he was still influenced by the inspector's assurance that all hand written entries were automatically false, but he did not acknowledge that any specific entries were false or that any of the entries were willfully and substantially falsified. The need to occasionally make hand written entries were explained by the petitioner:

> It is not usual for employees to forget to use the time clock occasionally. The write in entries are necessary to complete the time keeping procedure. The entry may be unintentionally "false" a few minutes either way, but never willfully false by enough margin to affect the accuracy of the payroll or leave records.

Res. App. p. 14.

The respondent's assertion that the petitioner admitted falsifying as much as 30 minutes of Clerk Harpole's time card is supported by this paragraph in his affidavit:

> On one occasion Mrs. Harpole reported that she had had car trouble and was about 30 minutes late, and was in a hurry to get to her position. I told her I would write her in as of that time, but before I could get to the time clock in the rear of the building I was diverted by other postal business and forgot her time card.

Res. App. p. 14.

The Postal Inspector's report did not allege that any of the time cards were false and certainly did not specify any cards as being

false. At the hearing Postal Inspector Hughes steadfastly refused to specify that any of the specific cards were falsified.

The factual questions (and answers) are important in understanding the background and the basis for the constitutional question in this case: Why did the Postal Service refuse to furnish petitioner with the applicable Postal Service regulations authorizing hand written entries in the discovery request prior to the hearing? Answer: Because the Service wished to continue the fiction that all hand written entries were *per se* false. Why did the Service refuse to specify the time cards that were allegedly false after the petitioner made timely discovery application for this information prior to the hearing? Answer: Because the Service, as explained in petitioner's opening brief, had already attempted to prove in another case that some of the specific entries were false and had failed to do so. (The arbitrator had found the witnesses to be contradictory and unworthy of belief.) Thus, the Service decided in this case to avoid the burden of proof, make a general charge, and rely on the petitioner's inability to refute the charge.

The respondent frequently explains that the petitioner knew what he was being charged with. He did, of course, know what he was being charged with -- making false entries on the time cards of Clerk Harpole, but that is not the question in this case -- the question is: How could anyone fully respond to a charge that broad?

The petitioner explained the circumstances of the "admission" affidavits, and gave sworn statements and testimony that none of

the entries were willfully falsified in a substantial sense. At that point, the burden should have shifted to the respondent to prove that at least some of the time cards were, indeed, false or substantially incorrect. Fundamental fairness and basic due process principles, require that any charging authority must first prove the *corpus delecti*; that is, that some time cards were, in fact, false.

The respondent's assertion in its brief (Note 7) that Clerk Harpole had presented a "false claim for pay" is not justified or supported by anything in the record. That charge was not made against the petitioner and its omission is important -- to have done so the respondent would have had to have presented some proof that certain time cards were falsified. It chose not to risk presenting that testimony because it had previously been rejected by an arbitrator.

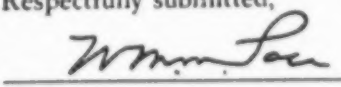
CONCLUSION

It is not necessary in this case to examine the existence or the desirability of each government employee having a vested constitutional right to his job -- the Congress has already done that by requiring the employing agency to prove the existence of a *corpus delecti* by a preponderence of the evidence as a basis for discharging the employee. (Otherwise, no employee who chose to tell the truth about his agency would have any protection.)

If allowed to stand, this Court of Claims decision will be authority for, not only vague and unanswerable charges, but will allow the

agencies to discharge employees without any proof that a violation occurred.

Respectfully submitted,



William M. Pace
Attorney for Petitioner

CERTIFICATE OF SERVICE

In compliance wit' the rules, I certify that I have this date served three copies of the above Reply Brief For Petitioner upon the Solicitor General of the United States, Department of Justice, Washington, D. C. 20530, and three copies upon Wyneva Johnson, Esquire, Attorney, Office of Labor Law, U. S. Postal Service, Washington, D. C. 20260 by first class mail.

This the 6th day of January, 1982.

WILLIAM M. PACE